

BELLIGERENCY RECOGNITION: PAST, PRESENT AND FUTURE

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Abstract

This article discusses belligerency recognition in a past, present, and future perspective. It is argued that, despite its gradual demise, belligerency recognition is still in existence and that it could be resurrected in appropriate cases.

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I. INTRODUCTION

In traditional international law, the realities of internal violence have been described in different terms,² depending on the level of violence, the success of the armed non-state actor (the “ANSA”) and the interests of the parent or other states. A rebellion was a first level in which violence was relatively low, the armed non-state actor created a little nuisance to the enemy state and there were minimal, if any, repercussions outside of the state where violence was taking place.³ Insurgency designated a relatively successful ANSA, possibly with some control over territory, whose actions had some consequences in the outside world. Belligerency implied a further increased level of violence and success for the ANSA and created the need for a more comprehensive corpus of legal rules to regulate the situation. This last situation will be the focus of this article. The purpose of this article is to expose the past of belligerency, examine its present, explain its retreat, and reflect on whether it deserves any future or adds value to the current state of international law.

II. THEORY

The earliest possibility for armed non-state actors to enter provisionally into the international arena became possible through recognition of belligerency: if some objective criteria were fulfilled and the incumbent government or a third state accorded recognition of belligerent status,⁴ the ANSA acquired a limited (international) personality,⁵ and certain international law rules became applicable.

The objective criteria relate to the attributes of the ANSA and the intensity of violence: large scale hostilities, occupation of a substantial part of state’s territory,⁶ a measure of orderly administration, observance of the laws of war, and acting of

2. See BRAD ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 173-182 (2000); NOELLE HIGGINS, *REGULATING THE USE OF FORCE IN WARS OF NATIONAL LIBERATION, THE NEED FOR A NEW REGIME: A STUDY OF THE SOUTH MOLUCCAS AND ACEH* 24-29 (2010).

3. See THOMAS J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 328-33 (7th ed. 1923); WILLIAM E. HALL, *A TREATISE ON INTERNATIONAL LAW* 36 (8th ed. 1924); see also CHARLES C. HYDE, *2 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 193 (8th ed. 1922) (using different terms).

4. The constitutive character of recognition is obvious.

5. LAWRENCE, *supra* note 3, at 64; Inter-Am. Comm’n H.R., Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.79, doc. 12 rev. 1 ch. V.II.5 (1991); ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 18 (2010); GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 86 (5th ed. 1986). But see Roberto Ago, *Fourth Report on State Responsibility*, 1972 2 Y.B. INT’L L. COMM’N 71, 140 U.N. Doc. A/CN.4/264 add. 1; Yoram Dinstein, *The International Law of Civil Wars and Human Rights*, 6 ISR. Y.B. HUM. RTS. 62, 77 (1976).

6. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 419 (2d ed. 2006) (“Belligerency assumed the existence of relatively stable territorial units . . .”)

the entity under responsible authority.⁷ A further prerequisite to recognition by a third state is the need to define the third state's relations with the warring parties.⁸

With regard to the characteristics of the recognized belligerent, it is obvious that it should be highly organized both as an army and as a governmental authority, probably in the scale of an occupying power. It is not certain whether the ANSA should have the characteristics of an army (art. 1 of the Annex to the 1907 Hague Convention IV),⁹ especially since neither the fixed distinctive emblem nor the criterion of openly carrying arms are explicitly spelled out in the objective criteria. By all probabilities, the answer should be affirmative.¹⁰ It is expected that only ANSAs which were formerly organized as an army (armed dissident forces) or armed non-state actors with high levels of organization, manpower, and weapons (nearing that of the enemy state army) could become recognized belligerents. Otherwise, it would be difficult to simultaneously conduct large scale hostilities in accordance with the international law of war, occupy a substantial part of territory, and administer the occupied area. With regard to the intensity of violence, the hostilities should be of a general (as opposed to a local) character,¹¹ as in an inter-state war. A "civil war is present when hostilities between organized and disciplined forces are conducted on the basis of military science, tactics and regulations, with the winning of specific military objectives as the immediate goal of fighting."¹² In addition, the requirements of control over territory and administration suggest that the conflict is spreading over time,¹³ although a specific period is not necessary.¹⁴

7. Institut de Droit International, *Résolution: Droits et Devoirs des Puissances Étrangères, au Cas de Mouvement Insurrectionnel, Envers les Gouvernements Établis et Reconnus qui sont aux Prises avec L'Insurrection*, art. 8 (1900), available at http://www.idi-iiil.org/idiF/resolutionsF/1900_neu_02_fr.pdf [hereinafter IDI Résolution]; Rosalyn Higgins, *Internal War and International Law*, in 3 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 81, 88 (Richard A. Falk & Cyril E. Black eds., 1971); Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 *RECUEIL DES COURS* 117, 145 (1979); LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 14 (2002).

8. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 176 (1947); see also CHARLES CHENEY HYDE, *1 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 77 (1922); Norman J. Padelford & Henry G. Seymour, *Some International Problems of the Spanish Civil War*, 52 *POL. SCI. Q.* 364, 366 (1937); MOIR, *supra* note 7, at 14; CULLEN, *supra* note 5, at 17. But see Charles Zorgbibe, *Sources of the Recognition of Belligerent Status*, 17 *INT'L REV. RED CROSS* 111, 124 (1977).

9. Hague Convention IV Regulations Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 *Stat.* 2277.

10. See Joseph B. Kelly, *Legal Aspects of Military Operations in Counterinsurgency*, 21 *MIL. L. REV.* 95, 97 (1963).

11. LAUTERPACHT, *supra* note 8, at 176.

12. Norman J. Padelford, *International Law and the Spanish Civil War*, 31 *AM. J. INT'L L.* 226, 227 (1937).

13. Richard A. Falk, *Janus Tormented: The International Law of Internal War*, in *THE INTERNATIONAL ASPECTS OF CIVIL STRIFE* 185, 197 (James N. Rosenau ed., 1964).

14. But see Sasha Radin, *The Current Relevance of the Recognition of Belligerency*, in *ARMED CONFLICT AND INTERNATIONAL LAW: IN SEARCH OF THE HUMAN FACE: LIBER AMICORUM IN MEMORY OF AVRIL McDONALD* 115, 124 (Marielle Matthee, Brigit Toebes & Marcel Brus eds., 2013) (stating that a 70 day period was not considered adequate for recognition of belligerency purposes).

The criterion on the application of the law of war¹⁵ is occasionally met with some skepticism. For Lawrence, "this is highly objectionable as a precondition, because it seems inconsistent to oblige insurgent forces into abiding by a law that does not apply reciprocally to them."¹⁶ Much more than inconsistent, it seems unfeasible to expect the insurgent entity to voluntarily apply such rules, which would place them in a disadvantageous position, with only the faint prospect of future recognition. Wilson also implied that this criterion might not be universally accepted.¹⁷ However, the mainstream view professes the existence of this criterion.

Apart from the objective features, another one is needed: the subjective criterion of (implied or explicit)¹⁸ recognition, given publicly.¹⁹ Recognition serves as the equivalent of a declaration of war in an interstate armed conflict. The opinion of writers varies as to the discretionary or obligatory character of recognition. Lauterpacht referred to a duty of the lawful government to grant recognition once "a clearly ascertained state of hostilities on a sufficient large scale creates a condition in which the rules of warfare become operative."²⁰ Quincy Wright also referred to an automatic obligation to apply the rules of warfare.²¹ But as with most instances of recognition, this seems to be a purely voluntary act.²² The lack of relevant practice as well as the reluctance of the civil society (and the International Committee of the Red Cross in particular) to support the automatic application of all humanitarian law norms in appropriate cases vividly shows the voluntary character of recognition. Consequently, the necessity of recognition can be justified through policy arguments. One commonly cited example relates to the treatment of captured governmental soldiers. Humanitarian policy considerations, though, are usually weak, if the government is mostly interested in suppressing the revolt rather than protecting its own citizens. Generally speaking, the rationale of

15. The degree of compliance that is adequate for recognition purposes is fairly unknown.

16. William H. Lawrence, *The Status Under International Law of Recent Guerrilla Movements in Latin America*, 7 INT'L L. 405, 407-08 (1973).

17. HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 25 (1988).

18. See IDI Résolution, *supra* note 7, art. 4.1; Vernon A. O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 AM. J. INT'L L. 398, 408 (1937); ERIK CASTREN, CIVIL WAR 146 (1966); Radin, *supra* note 14, at 127.

19. LAWRENCE, *supra* note 3, at 329.

20. LAUTERPACHT, *supra* note 8, at 175, 243; *see also* Denmark, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-B 332 (1951) [hereinafter 1949 Records] ("[W]e are in certain cases obliged in international law, to recognize as belligerents, Parties which are not States . . .").

21. Quincy Wright, *The American Civil War*, in THE INTERNATIONAL LAW OF CIVIL WAR 30, 104 (Richard E. Falk ed., 1971); *see also* O'Rourke, *supra* note 18, at 405 (author's citation of similar opinions).

22. See CASTREN, *supra* note 18, at 173; O'Rourke, *supra* note 18, at 402; Georges Abi-Saab, *The Specificities of Humanitarian Law*, in ETUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE EN L'HONNEUR DE JEAN PICTET 265, 266 (Jean Simon Pictet & Christophe Swinarski eds., 1984); Falk, *supra* note 13, at 204; Schindler, *supra* note 7, at 145; Jose Maria Ruda, *Recognition of States and Governments*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 449, 461 (Mohammed Bedjaoui ed., 1991); Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 118 (2000); CRAWFORD, *supra* note 6, at 381.

belligerency recognition barely included humanistic considerations; it has been purely motivated by state interests.²³

Theoretically, recognition could also be granted to internal armed conflicts below the threshold of civil war, if the *de jure* government chose to do so.²⁴ Yet, this should not be assumed too easily: a recognized belligerent, without satisfying the objective criteria, might not be able to incur international responsibility and recognition would come at the expense of third states. In the end, any “premature” recognition by the parent state²⁵ would probably be contrary to good faith and might not necessarily exonerate the same state from international responsibility. This position, though, is a further argument on the voluntary character of recognition and, simultaneously, an argument on the relative unimportance of the objective criteria, including application of the laws of war.

A particular characteristic of belligerency recognition is its irrevocable character,²⁶ provided, of course, that the objective circumstances that generated it still exist.²⁷

The modalities of recognition are another debatable issue. It makes sense that only tacit recognition should be expected from the parent state, while a certain formality is more feasible from third states.²⁸ According to the Institute of International Law, “application of certain laws of war by the parent government for humanity reasons does not equal to recognition of belligerency.”²⁹ This is in fact another argument that state interests induce recognition of belligerency. Padelford, on the other hand, refers to an opposite customary rule “if the parent government orders its military commanders to employ the international rules, or if it publicly proclaims that it will apply them,” without distinguishing as to the motive behind application.³⁰ Castren³¹ has supported that “treaties entered with insurgents on suspension of hostilities and, of course, peace have to be judged as recognition of

23. CULLEN, *supra* note 5, at 22; SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 15-16 (2012). *But see* United States v. The Ambrose Light, 25 F. 408, 418-19 (S.D.N.Y. 1885) (stating that belligerency “is a concession to rebels in the interest of humanity and expediency,” although later admitting that “[r]ecognition may rightfully be given or withheld by other nations, according to their views of their own interests, their moral sympathies, their ties of blood, or their treaty obligations; or according to their views of the merits or demerits of the revolt, its extent, or probabilities of success”); HALL, *supra* note 3, at 38; Zorgbibe, *supra* note 8, at 111; Rüdiger Wolfrum & Christiane E. Philipp, *The Status of the Taliban: Their Obligations and Rights Under International Law*, 6 MAX PLANCK Y.B. U.N. L. 559, 583 (2002).

24. *See* CASTREN, *supra* note 18, at 138; ROBERT KOLB & RICHARD HYDE, *AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS* 66 (2008).

25. *See also* Radin, *supra* note 14, at 128 (if a third state recognized belligerency prematurely, it would constitute intervention in the internal affairs of the state).

26. HALL, *supra* note 3, at 42.

27. Whilst this is not acknowledged explicitly, it makes sense that a vital change in the factual situation, e.g. regarding the lack of any control over territory by the recognized belligerent or the lack of external repercussions, could not sustain the consequences of recognition.

28. HALL, *supra* note 3, at 42-43.

29. IDI Résolution, *supra* note 7, art. 4.2; *see also* Francis Lieber, Instructions for the Government of Armies of the United States in the Field, General Order No. 100, art. 152 (Apr. 24, 1863).

30. Padelford, *supra* note 12, at 229.

31. CASTREN, *supra* note 18, at 146.

belligerency,³² for in a way these relations acknowledge their legal capacity; the same may apply to what is merely a proposal of peace and the acceptance of an offer for mediation.”³³ A declaration of neutrality by a third state was also considered to be an instance of recognition.³⁴ The institution of a blockade is considered to be a classic example³⁵ as well as, more generally, the “acknowledgment of belligerent rights in the high seas.”³⁶ Distinction should also be made between an act which produces a legal result and subsequent failure to act accordingly.³⁷ For example, the formal notification of recognition by a third state and its subsequent violation of neutrality laws should not mean that recognition was not granted. Therefore, the more formal recognition is, the more difficult it will be to escape its consequences. Along these lines, it makes sense that states would prefer implicit acts of recognition upon which they could later claim that recognition was never granted, in accordance with their policy goals.

The main outcome of recognition by the government is that the belligerents are obliged to respect the laws of war in force. So, in essence, recognition transforms the voluntary character of observance of the laws of war by the insurgents to a legal obligation for both parties to the conflict. The customary law of war applies, including the relevant law for maritime war³⁸ and insurgents “warlike activities, especially on the high seas, [will not] be ... regarded as lawless acts of violence which, in the absence of recognition, might subject them to treatment as pirates.”³⁹ There has been some controversy on whether the Geneva Conventions⁴⁰ as a whole would apply.⁴¹ Since the belligerent is not a signatory party to the Geneva

32. See Padelford, *supra* note 12, at 229; Zorngibe, *supra* note 8, at 114.

33. See Falk, *supra* note 13, at 206 (referring to “conduct of the incumbent that discloses a willingness to negotiate with the insurgent elite on the level of equality”).

34. Percy E. Corbett, *The Vietnam Struggle and International Law*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 348, 371 (Richard E. Falk ed., 1971); Radin, *supra* note 14, at 127.

35. Recognition of belligerency in the American Civil War was initiated by a blockade, although its effectiveness, as one of the criteria for its legality, is debatable. For details of the blockade see James Kraska, *Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?*, 13 Y.B. INT'L HUMANITARIAN L. 367, 390 (2010); Martin David Fink, *Contemporary Views on the Lawfulness of Naval Blockades*, 1 AEGEAN REV. L. SEA & MAR. L. 191, 205 (2011).

36. Falk, *supra* note 13, at 203.

37. Padelford, *supra* note 12, at 229.

38. See INT'L INST. HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (1994) [hereinafter SAN REMO MANUAL]. On the value of the Manual, see THE TURKEL COMM'N, THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, 1, 43 (2011) (describing it as a “detailed current statement of the customary international law of naval warfare . . .” with some exceptions); Fink, *supra* note 35, at 200 (“It is widely considered as the most modern and authoritative publication concerning the laws of naval warfare.”).

39. PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 53 (1948).

40. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

41. See G.I.A.D. DRAPER, THE RED CROSS CONVENTIONS 16 (1958) (excluding the applicability of the Conventions based on the *travaux préparatoires* and the language of article 2, referring to

Conventions, only those parts of the treaties that are customary would be applicable. Ruda includes human rights in the outcome of recognition⁴² and this position must be deemed as right because as an entity with a limited and provisional international legal personality, the recognised belligerent incurs certain customary international law duties and rights, including those that are applicable during war. The rules of international responsibility⁴³ become applicable as well, unless more specific rules exist in the customary laws of war, and the insurgent entity could be liable to pay compensation for its wrongdoings.⁴⁴ In parallel, the territorial state was considered to be freed from international responsibility for the acts of rebels.⁴⁵ Their status is confined only to the period of armed conflict,⁴⁶ or better, to the period of war.

There is an opinion that recognition by the parent state generates results for third states as well.⁴⁷ Rosalyn Higgins has even claimed that “if the lawful government recognizes belligerency, third states are bound to grant recognition.”⁴⁸ This is probably an overstatement; certainly third states would be politically at ease to recognize belligerency once the parent government has decided accordingly. The orthodox view is that third states can decide for themselves without being obliged by the actions of the parent state.

Powers- therefore states); see also MOIR, *supra* note 7, at 40-42; François Bugnion, *Jus Ad Bellum, Jus in Bello and Non-International Armed Conflicts* 6 Y.B. INT'L HUMANITARIAN L. 167, 181 (2003) (excluding the law governing occupation and the Protecting Powers mechanism). *Contra* Egypt [1974-1977] 8 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 235 [hereinafter 1977 Records]; U.S. ARMY, INT'L & OPERATIONAL L. DEP'T, LAW OF WAR HANDBOOK 27 (2004); YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 34 (2009).

42. Ruda, *supra* note 22, at 461.

43. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries in Report of the International Law Commission: Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Sept. 6, 2001).

44. See also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 63 (7th ed. 2008) (on its treaty-making capacity). *But see* LAWRENCE, *supra* note 3, at 65.

45. The Ambrose Light, 24 F. at 418; HALL, *supra* note 3, at 37; Corbett, *supra* note 34, at 371; VON GLAHN, *supra* note 5, at 87. *But see* LAUTERPACHT, *supra* note 8, at 247 (stating that this is incorrect because “there is no warrant for the opinion that, normally, the lawful government is responsible for the acts of the insurgents or for losses suffered by foreigners as a result of the insurrection”); Int'l Law Comm'n, *Texts of Articles 10-15 and Commentaries Thereto as Adopted by the Commission at Its Twenty-Seventh Session* [1975] 2 Y.B. Int'l L. Comm'n. 59, 92, U.N. Doc. A/10010/Rev.1 (“[I]t will rarely be possible to accuse a State of failing in its own obligations of vigilance and protection in relation to the conduct of organs of an insurrectional movement . . .”).

46. Ruda, *supra* note 22, at 461; Wolfrum & Philipp, *supra* note 23, at 578.

47. HALL, *supra* note 3, at 36; Wolfrum & Philipp, *supra* note 22, at 579-80; Radin, *supra* note 14, at 122. See also O' Rourke, *supra* note 18, at 402; LAUTERPACHT *supra* note 8, at 247 (being more reluctant). *Contra* IDI Résolution *supra* note 7, art. 5.1; The Ambrose Light, 24 F. at 419; Zorgbibe, *supra* note 8, at 120; VON GLAHN *supra* note 5, at 88; Hazem Atlam, *National Liberation Movements and International Responsibility*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 35, 41 (Marina Spinedi & Bruno Simma eds., 1987); SIVAKUMARAN, *supra* note 23, at 15.

48. Higgins, *supra* note 7, at 112; see also Falk, *supra* note 13, at 206 (providing that if the conditions are fulfilled then “it is arguable that it is intervention to refuse recognition of insurgency as belligerency”); Brian K. Landsberg, *The United States in Vietnam: A Case Study in the Law of Intervention*, 50 CAL. L. REV. 515, 525 (1962).

Recognition by a foreign state entails the operation of the laws of war just in relation to the ANSA and the foreign government.⁴⁹ As a consequence, the laws of neutrality apply⁵⁰ (including a prohibition on furnishing war materials to the belligerents), which, in essence, means that there is a duty of non-participation and impartiality.⁵¹ There is an opinion⁵² that recognition by third states would also bring on the laws of war in the relations between the parent state and the recognized belligerent. In any case, such act of recognition by a third state constitutes a significant blow to the legitimacy of the central government, as it would imply that both sides to the conflict enjoy an equal status.

The intense theoretical debates on belligerency recognition were also followed by a certain practice, to which we now turn, with reference to the period after the Second World War.

III. PAST PRACTICE

The doctrine of belligerency functioned in the 19th century and a part of the 20th century.⁵³ It was the only institution which sought to cover certain aspects of the civil war (essentially a matter of domestic jurisdiction).

It is plausible that in the period between the 1930s and the 1960s, there were relatively many instances when the doctrine could have been applied. The civil war in Spain marked the beginning (or ending) of a growing disbelief on the usefulness of the doctrine.⁵⁴ In Yemen, all the participants in the civil war acknowledged the applicability of the principles of the Geneva Conventions,⁵⁵ with debatable success, but that didn't seem to amount to recognition of belligerency: such vocabulary was barely used.⁵⁶ In the Katanga province of the Congo, all the participants in the civil

49. Schindler, *supra* note 7, at 145; Abi-Saab, *supra* note 22, at 266; Wolfrum & Philipp, *supra* note 23, at 579-80.

50. Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415.

51. Michael Bothe, *The Law of Neutrality*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 571, 584-85 (Dieter Fleck ed., 2nd ed. 2008).

52. JAMES E. BOND, *THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR* 34 (1974); CULLEN, *supra* note 5, at 20. *See also* Ann Van Wynen Thomas & Aaron J. Thomas, Jr., *International Legal Aspects of the Civil War in Spain 1936-39*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 111, 122 (Richard E. Falk ed., 1971) (being more reluctant). For earliest voices in this regard, see Georges Abi-Saab, *Non-International Armed Conflicts*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* 217, 218 (1988).

53. For a brief overview of the realities before and during that period, see CASTREN, *supra* note 18, at 38.

54. For several actions that could imply recognition by third states, see O'Rourke, *supra* note 18, at 409, and LAUTERPACHT *supra* note 8, at 250. *See also* Padelford, *supra* note 12, at 229 (supporting fiercely that belligerency was recognized); U.K. MINISTRY OF DEF., *THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT*, ¶ 3.1.2 (2004) [hereinafter U.K. MANUAL].

55. Kathryn Boals, *The Relevance of International Law to the Internal War in Yemen*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 303, 315 (Richard E. Falk ed., 1971).

56. *Id.* at 314.

war acknowledged the application of the principles of the Geneva Conventions.⁵⁷ Recognition of belligerency, though, was not really discussed.

Algeria is a much more interesting case.⁵⁸ There, the French instituted a search and visit policy against neutral shipping (akin to a blockade)⁵⁹ and set up prisoner-of-war-like campuses, while avoiding admitting prisoner-of-war status for those captured.⁶⁰ The Algerians, on the other hand, ordered the observation of all the laws of war (including the Geneva Conventions),⁶¹ while they also claimed belligerent recognition,⁶² a claim that was denied by France.⁶³ In 1960, Algeria attempted - and succeeded - in acceding to the Geneva Conventions,⁶⁴ before actual independence and while the war was still continuing. This, in essence, meant that the Conventions would be applicable as a whole, even if France did not recognize Algeria as an independent state (and the armed conflict between them as international), because common art. 2.1 covered such situations.⁶⁵ Before accession, though, more (if not exclusive) reliance was placed by France and outside actors (such as the International Committee of the Red Cross) on the application of common article 3.⁶⁶

57. Donald W. McNemar, *The Post-Independence War in the Congo*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 244, 259-60 (Richard E. Falk ed., 1971); MOIR, *supra* note 7, at 75.

58. Jean Siotis, *La Protection de la Personne Humaine dans les Conflits Armés ne Présentant pas un Caractère International*, 12 MIL. L. & L. WAR REV. 281, 286 (1973) ("The conditions for an implicit recognition of belligerence were present."). *But see* WILSON, *supra* note 17, at 110 ("[I]n Algeria the provisional government did not control territory.").

59. *See* Kraska, *supra* note 35, at 374 (indicating that it was a blockade); Wolf Heintschel von Heinegg, *Methods and Means of Naval Warfare in Non-International Armed Conflicts*, in *NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY* 211, 214 (Kenneth Watkin & Andrew J. Norris eds., 2012). *But see* Roger Pinto, *Les Règles du Droit International Concernant la Guerre Civile*, 114 RECUEIL DES COURS 455, 546 (1965) (providing a description of the "blockade" that does not really point towards this direction).

60. WILSON, *supra* note 17, at 153.

61. Arnold Fraleigh, *The Algerian Revolution as a Case Study in International Law*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 179, 196 (Richard E. Falk ed., 1971); WILSON, *supra* note 17, at 154.

62. Fraleigh, *supra* note 61, at 218. *See* Russell Buchan, *The International Law of Naval Blockade and Israel's Interception of the Mavi Marmara*, 58 NETHER. INT'L L. REV. 209, 218 (2011) (opining that belligerency was recognized); Kelly, *supra* note 10, at 100 (being negative). Interestingly, it appears that while claiming recognition, Algeria tried to preclude the law of neutrality from applying to states aiding it, while maintaining its effect for other states.

63. Fraleigh, *supra* note 61, at 203. For the stance of the U.S., *see id.* at 215.

64. For some reactions to this accession, *see* Eldon Van Cleef Greenberg, *Law and the Conduct of the Algerian Revolution*, 11 HARV. INT'L L.J. 37, 65-66 (1970). *See also* STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* 15 (1998) (providing that almost 31 states have recognised the Provisional Government of the Algerian Republic, before independence).

65. *See also* Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(A) 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Greenberg, *supra* note 64, at 64 ("In the last years of the war there seemed to be a tendency in the judgements of the high court to admit the distinction between terrorists and regular (Algerian) forces and perhaps even to imply that the latter could be accorded prisoner of war status.").

66. Kelly, *supra* note 10, at 103; Eibe Riedel, *Recognition of Belligerency*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 47 (Rudolf Bernhardt ed., 1982).

In the 1960s, there was a wave of interest from U.S. writers mainly,⁶⁷ prompted by the realities of the Vietnam War and interventions to this conflict. According to academic sources,⁶⁸ the conflict in Nigeria/Biafra was the last recorded recognition of belligerency by the incumbent government. There, the institution of a blockade⁶⁹ was, similarly, an indication for that conclusion. Nonetheless, part of the doctrine still refers to the American civil war as the latest paradigm of belligerency recognition.⁷⁰

Past practice shows a slow demise on the use of the doctrine. It is time to examine more closely where belligerency recognition stands at present.

IV. THE CURRENT STATUS OF BELLIGERENCY RECOGNITION

As noted before, belligerency refers to a situation of internal armed conflict, which, through recognition, is transformed to an international armed conflict. Therefore, the treaties on humanitarian law could have impact on its existence since they, progressively, sought to regulate a previously lawless situation, regardless of the existence of recognition. Taking into account that the doctrine belongs in the sphere of customary law, the next step is to examine whether it has been superseded and/or terminated by subsequent treaties or customary rules.

The Geneva Conventions of 1949 have devoted common art. 3 to the regulation of non-international armed conflicts, a notion that in itself includes traditional civil wars. Common art. 3 was intended to apply through objective criteria, unlike the subjective approach of belligerency, which is based on a legal prerequisite (recognition).⁷¹ Several delegations, such as the U.K.,⁷² expressed their concerns that this minimal humanitarian regulation would impliedly recognize

67. Landsberg, *supra* note 48, at 525; Thomas M. Franck & Nigel S. Rodley, *Legitimacy and Legal Rights of Revolutionary Movements with Special Reference to the Peoples' Revolutionary Government of South Viet Nam*, 45 N.Y.U. L. REV. 679, 684 (1970); Daniel G. Partan, *Legal Aspects of the Vietnam Conflict*, 46 B.U. L. REV. 281, 300-01 (1966).

68. Zorbigbe, *supra* note 8, at 114; INGRID DETTER, *THE LAW OF WAR* 40 (2nd ed. 2000); Bugnion, *supra* note 41, at 181; *but see also* Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 106 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Schindler, *supra* note 7, at 145; CRAWFORD, *supra* note 6, at 406; HIGGINS, *supra* note 2, at 29; SIVAKUMARAN, *supra* note 23, at 17 (rejecting explicitly that any recognition was granted); *cf. The Operational Code of Conduct for the Nigerian Armed Forces, in HOW DOES LAW PROTECT IN WAR, VOL. II: CASES AND DOCUMENTS* 1136 (Marco Sassòli & Antoine A. Bouvier eds., 2nd ed. 2006) (referring explicitly to the rebellion of the enemy ANSA and excluding, therefore, any recognition as belligerents; on the other hand the reference to treatment of those who surrender as "prisoners of war" could be read that way, although there are quite many similar references even in agreements between states and ANSAs).

69. WILSON, *supra* note 17, at 155.

70. Siotis, *supra* note 58, at 284; Shigeki Miyazaki, *The Application of the New Humanitarian Law*, 20 INT'L REV. RED CROSS 184, 185 (1980); Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, [1985] BRIT. Y.B. INT'L L. 186, 197.

71. In essence the same has happened in interstate wars, with the substitution of a state of war with an international armed conflict situation. Under the Hague Conventions, states have refused to implement the laws of war on the pretext that there was no war (as the trigger of applicability of the Conventions), because there was no prior declaration thereof.

72. 1949 Records, *supra* note 20, at 10.

“belligerency” under traditional law. It was similarly suggested that recognition of belligerency would be one of the prerequisites for the applicability of the article,⁷³ while recognition for the purpose of the Convention’s applicability was also drawn to the table, after an Australian proposal.⁷⁴ However both suggestions were not followed up, mainly because they would nullify the humanitarian impact of this article and its applicability in situations that were not civil wars in the classic sense. Significantly, the linkage between belligerency and the Geneva Conventions was discussed at the occasion of a proposal by the International Committee of the Red Cross to have all the Conventions applicable during a non-international armed conflict.⁷⁵ The adoption of Resolution No. 10 clarified the situation even more,⁷⁶ since it provides that “the conditions under which a Party to a conflict can be recognised as a belligerent by Powers not taking part in this conflict are governed by the general rules of international law on the subject and are not in any way modified by the Geneva Conventions.” In addition, common art. 3.4 clearly meant that its application did not confer belligerent status, but also “left open an option for belligerent recognition in suitable cases.”⁷⁷ Furthermore, common art. 2.3 of the Geneva Conventions leaves a window of opportunity for recognized belligerents to apply the Geneva law,⁷⁸ besides its customary provisions.

The negotiating records for the Additional Protocol II⁷⁹ reveal a similar picture. Some states have claimed that the applicability of the Protocol to ANSAs would confer them belligerent status.⁸⁰ There was also the view that the criteria for the applicability of the Protocol equated those necessary for belligerency recognition,⁸¹ but this is only partially true; belligerency requires a measure of orderly administration, a feature which is not indispensable in Additional Protocol II.⁸² Moreover, even the scope of territorial control might be different: “control

73. *Id.* at 12 (receiving support from China).

74. *Id.* at 15.

75. *Id.* at 47.

76. *Id.* at 362.

77. Riedel, *supra* note 66, at 170; *see also* CASTREN, *supra* note 18, at 85-86; WILSON, *supra* note 17, at 28.

78. *See* Schindler, *supra* note 7, at 130; WILSON, *supra* note 17, at 50.

79. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

80. Venezuela is one example. *See* 1977 Records vol. 9, *supra* note 41, at 315.

81. Riedel, *supra* note 66, at 170; Medard R. Rwelamira, *The Role of International Humanitarian Law in Internal Disturbances and Tension Situations: Some Reflections*, 20 COMP. & INT’L L.J. S. AFR. 175, 177 (1987); Rosemary Abi-Saab, *Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern*, in HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 209, 216 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991); John Baloro, *International Humanitarian Law and Situations of Internal Armed Conflicts in Africa*, 4 AFR. J. INT’L & COMP. L. 449, 459 (1992); George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT’L L. 42, 60 (2000); KIRSTI SAMUELS, *POLITICAL VIOLENCE AND THE INTERNATIONAL COMMUNITY DEVELOPMENTS IN INTERNATIONAL LAW AND POLICY* 16 (2007). *Contra* 1977 Records Vol. 7, *supra* note 41, at 77 (Canada); CULLEN, *supra* note 5, at 106.

82. Djamchid Momtaz, *Le Droit International Humanitaire Applicable aux Conflits Armes Non Internationaux*, 292 RECUEIL DES COURS 9, 50 (2001), L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 83 (3rd ed. 2008); SIVAKUMARAN, *supra* note 23, at 191. *But see* HILAIRE

over a part of its territory...as to enable them to carry out military operations and implement the Protocol” (under Additional Protocol II) is different from occupation of a substantial part of territory (under the belligerency doctrine).⁸³ Even a small part of the national territory (e.g., 1% of the whole) could be enough, depending on circumstances, for the ability of carrying out military operations and implementing the Protocol,⁸⁴ while it will not satisfy the relevant criterion for recognition. In the end, nothing suggests that Additional Protocol II has superseded the doctrine of belligerency.

Eminent authorities, such as the International Criminal Tribunal for the former Yugoslavia⁸⁵ and the International Law Institute,⁸⁶ have recently referred to the customary international law doctrine for the recognition of belligerency. Military sources also refer to this doctrine,⁸⁷ along with international humanitarian law books and other academic sources.⁸⁸ On the other hand, there is significant authority speaking to the doctrine’s demise.⁸⁹ In essence, “the real test is whether

MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 172 (1990) (suggesting that the formulation of the article implies that there is quasi-governmental control of a significant portion of territory).

83. See also 1977 RECORDS Vol. 4, *supra* note 40, at 7 (defeated proposition of Indonesia) (referring to occupation of “a substantial part of the territory”); 1977 RECORDS Vol. 4, *supra* note 41, at 8 (Brazil) (referring to “continuous and effective control over a non-negligible part of the territory”).

84. See Art. 5.2c of the Protocol, which might have a particular importance in this regard:

Places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety.

Consequently if the area of insurgent control is limited, then the ability to implement this article might be limited and therefore one of the criteria for the Protocol’s applicability is not fulfilled. Of course if the ANSA does not implement this article (e.g. it does not intern/detain people or instead chooses to commit war crimes by killing them), this would not necessarily entail that the Protocol does not apply. See also SIVAKUMARAN, *supra* note 23, at 186-87.

85. Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defence Motion for Jurisdiction, ¶ 69 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995).

86. Institut de Droit International, *Resolution: The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties* ¶ II (Aug. 25, 1999). See also Inter-Am. Comm’n H.R., *supra* note 5.

87. U.S. ARMY *supra* note 41, at 27; AUSTRALIAN DEFENCE FORCE WARFARE CENTRE, AUSTRALIAN DEFENCE DOCTRINE PUBLICATION 06.4 – LAW OF ARMED CONFLICT § 1.35 (2006). But see UK MANUAL, *supra* note 54, ¶ 15.1.2 (“In the past, the application of the law of armed conflict in non-international armed conflict was largely dependent on ‘recognition of belligerence’. The law of armed conflict, or parts of it, could be brought into effect if a government recognized the belligerent status of an insurgent faction opposing it, or if foreign states recognized the belligerent status of that faction. The doctrine has declined to the point where recognition of belligerency is almost unknown today.”).

88. Frits Kalshoven, *Protocol II, the CDDH and Colombia*, in INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 597, 603 (Karel Wellens ed., 1998); Buchan, *supra* note 62, at 230; Radin, *supra* note 14, at 139; von Heinegg, *supra* note 59, at 213, 228.

89. See Franck & Rodley, *supra* note 67, at 683 (noting that it has fallen into disuse); Ministry of Foreign Affairs of Colombia, *Recognition of State of War Respecting the FARC (Fuerzas Armadas Revolucionarias de Colombia)*, 2 Y.B. INT’L HUMANITARIAN L. 440, 440-41 (1999); see also David Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT’L L. 37, 40 (1979) (describing it as useless); RENÉ PROVOST, INTERNATIONAL HUMAN

States seriously view it as a legal reality in modern times, and its total non-use, although not conclusive evidence, must nevertheless be carefully assessed.”⁹⁰

Most contemporary practice shows two things: 1) that the parent state vehemently denies any such instance of belligerency recognition and 2) that third states are more willing to proceed accordingly. In 1979, members of the Andean Group declared that they recognised both sides in the Nicaraguan conflict as belligerents.⁹¹ More recently, the Philippines proclaimed a state of rebellion in 2003.⁹² Therefore, it seems that the relevant government could accept the possibility of a future recognition of belligerency.⁹³ The Venezuelan National Assembly’s vote “to support . . . Chavez’s call for Colombia to recognize the ‘belligerent status’ of the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN)”⁹⁴ suggests the continuing existence of belligerency recognition. Similarly a joint statement by the Governments of France and Mexico on August 28, 1981, “in which they recognised the Alliance of the Frente de Liberacion Nacional Farabundo Marti and the Frente Democratico Revolucionario as being a representative political force and, as such, entitled to take part in establishing the necessary machinery of rapprochement and negotiation for finding a political solution to the crisis,”⁹⁵ could have been labelled as recognition of belligerence.⁹⁶ Of course, such characterization may have been overly ambitious.

Apart from verbal recognition, several acts could have implied recognition. The institution of a naval blockade was considered to be a classic example for the initiation of belligerency. Such instances have purportedly taken place recently by Papua New-Guinea against Bougainville,⁹⁷ Sri Lanka against the Tamil,⁹⁸ and

RIGHTS AND HUMANITARIAN LAW 279 (2002) (noting that it became obsolete); KOLB & HYDE, *supra* note 24, at 66 (assessing that the doctrine after 1949 has progressively fallen into oblivion). These qualifications, though, do not necessarily entail that it does not exist as such.

90. Doswald-Beck, *supra* note 70, at 197.

91. VON GLAHN, *supra* note 5, at 87; TALMON, *supra* note 64, at 309. *But see* Schindler, *supra* note 7, at 146 (“[T]his recognition was not intended to have the effects provided for in international law but was rather a political manifestation in favour of the insurgents.”).

92. See Soliman M. Santos Jr., *Correspondent’s Report: The Philippines*, 6 Y.B. INT’L HUMANITARIAN L. 560, 561-62 (2003).

93. See Soliman Santos, Jr., *The Recent MILF Agreements, Belligerency Status, International Law and the Philippine Constitution*, http://kalilintad.tripod.com/soliman_santos.htm (last visited Jan. 30, 2014) (citing several reservations of the governmental side that certain of its actions could imply something similar).

94. Kiraz Janicke, *Venezuelan Legislature Supports Belligerent Status for Colombian Rebels*, VENEZUELAN ANALYSIS (Jan. 19, 2008, 10:44 AM), <http://venezuelanalysis.com/print/3080>.

95. Special Rapporteur – on the Situation of Human Rights in El Salvador, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories*, ¶ 39, U.N. Doc. E/CN.4/1502 (Jan. 18, 1982).

96. See ROTH, *supra* note 2, at 178-79.

97. *But see* Tim McCormack, *The ‘Sandline Affair’: Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict*, 1 Y.B. INT’L HUMANITARIAN L. 292, 293 (1998) (describing it rather as a “trade and transport embargo”).

98. *Navy foils LTTE Attack on Ground Troops: Three LTTE Boats sunk, 12 Sea Tigers killed off Vellamullaivaikkal*, SRI LANKA NAVY (Apr. 26, 2009), <http://www.navy.lk/index.php?id=1290>.

Saudi Arabia against the Yemeni Shiite rebels.⁹⁹ However, in the first example, the “blockade” was imposed in the 12-mile territorial sea and the use of the term was avoided (instead there was a reference to “stop and search powers”). Further, some of the necessary elements for a blockade’s declaration (e.g., timeline within which neutral ships should abandon the enemy coastline) were not mentioned at all.¹⁰⁰ Similarly, the “blockade” in Sri Lanka was also placed within territorial waters and von Heinegg considers it as “misleading” to refer to it as a blockade.¹⁰¹ With regard to third example, it is unknown where the blockade was imposed or if the declaration was either political or intended to designate a legal situation. In all these instances, the effectiveness of the blockade is similarly unknown. Without such questions answered, the realization of recognition appears remote.

Similarly, the blockade of Israel to Gaza, as declared and effected during and after the Operation Cast Lead, could be viewed as an indication for recognition.¹⁰² It might simply be argued, though, that since “naval blockades . . . are methods of warfare typical of an international armed conflict,”¹⁰³ Israel views this conflict as international.¹⁰⁴ However, the fact that international law does not acknowledge the institution of a blockade in a non-international armed conflict¹⁰⁵ should not *ipso*

99. *Saudis 'to keep up Houthi campaign'*, Al Jazeera (Nov. 10, 2009), <http://www.aljazeera.com/news/middleeast/2009/11/20091110141322184400.html>; *Saudis Impose Naval Blockade Off Yemen Coast*, Associated Press (Nov. 10, 2009), http://www.nytimes.com/2009/11/11/world/middleeast/11briefs-Saudibrf.html?_r=2&fta=y&.

100. See Notice to Mariners No. 36/90 issued by the government of Papua New Guinea.

101. Von Heinegg, *supra* note 59, at 215.

102. Kevin Jon Heller, *The Civil War and the Blockade of Gaza (a Response to Posner)*, OPINIO JURIS, <http://opiniojuris.org/2010/06/04/eric-posners-incomplete-editorial-on-the-blockade-of-gaza> (“[T]he institution of a blockade is itself evidence that a conflict with a non-state actor is sufficiently serious that the blockading party must treat the non-state actor as a *belligerent*, not as an *insurgent*.”).

103. Natalino Ronzitti, *The 2006 Conflict in Lebanon and International Law*, 16 ITAL. Y.B. INT'L L. 3, 9 (2006); Buchan, *supra* note 62, at 215; Wolff Heintschel von Heinegg, *Naval Blockade, in INTERNATIONAL LAW ACROSS THE SPECTRUM OF CONFLICT: ESSAYS IN HONOUR OF PROFESSOR L.C. GREEN ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 203, 204* (Michael N. Schmitt ed., 2000) (rather implicitly); see also Robert D. Powers Jr., *Insurgency and the Law of Nations*, 16 JAG J. 55, 60 (1962) (“In the absence of a recognition of belligerency, there is no right of Blockade.”).

104. In fact it does so, irrespective of the blockade, as does also the majority of states, international organizations and academia, on the ground that military occupation continues. See THE TURKEL COMM’N, *supra* note 38, at 47. See also REPORT OF THE SECRETARY-GENERAL’S PANEL OF INQUIRY ON THE 31 MAY 2010 FLOTILLA INCIDENT, 41 (2011) [hereinafter REPORT OF THE SECRETARY-GENERAL’S PANEL] (considering that the conflict should be treated as an international one for the purposes of the law of blockade); TURKEL COMM’N, *supra* note 37, at 49-50 (starting from the assumption that the conflict is international, although it was ready to proceed in the same way, regardless of the character of the conflict). It is problematic, though, that Israel tends to avoid the repercussions that come with this characterization- one being the legality of a potential blockade by Hamas to Israel. See Andrew Sanger, *The Contemporary Law of Blockade and the Gaza Freedom Flotilla*, 13 Y.B. INT'L HUM. L. 397, 434 (2010).

105. UK MANUAL, *supra* note 54, ¶¶ 13.65-13.76; OFFICE OF THE JUDGE ADVOCATE GEN. (CAN.), LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, ¶ 844-51 (2001) [hereinafter OFFICE OF THE JUDGE ADVOCATE GEN.] (both do not expressly require that a blockade is only effected during international armed conflicts. It is the scope of the relevant chapters on non-international armed conflicts that do not make any reference to blockades). See INT’L INST. OF HUMANITARIAN LAW, MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA

facto entail that it is irrelevant¹⁰⁶ or prohibited as such.¹⁰⁷ Certainly, if it is imposed in the territorial waters, there is little question about it since it is a question of sovereignty.¹⁰⁸ The effects of a blockade on the civilian population or the rights of neutral states are other issues. For the Turkel Commission, “it is likely there will be a willingness on the part of courts and other bodies to recognize that the rules governing the imposition and enforcement of a naval blockade are applicable to non-international armed conflicts.”¹⁰⁹ Taking into account that “neutral states have not disputed Israel’s prima facie right to blockade Gaza,”¹¹⁰ it could be argued that there is an evolvement.¹¹¹ Nonetheless, it is probably out of question that naval blockades in non-international armed conflicts are permissible under customary international humanitarian law,¹¹² especially since the law of blockades belongs itself to customary law and therefore adequate proof of state practice and *opinio juris* is still needed. For the time being, recognition of belligerency and/or the international armed conflict option still remain the most convincing grounds for the legality of a blockade.

The designation of the Gaza Strip as enemy territory could also be seen under the lenses of belligerency. However, the assessment by the Ministry of Foreign

73 (Louise Doswald-Beck ed., 1995) (“[A]lthough the provisions of the Manual are primarily meant to apply to international armed conflicts at sea, this has intentionally not been expressly indicated in paragraph 1 in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations.”). See also REPORT OF THE SECRETARY-GENERAL’S PANEL, *supra* note 104, at 85 (“Furthermore, while many other provisions of the manual refer to ‘belligerent States’, in the specific provisions on blockade, mention is broadly made of ‘belligerents.’”). This language, though, could also include recognized belligerents.

106. Sanger, *supra* note 104, at 421.

107. Much would depend though on whether the silence of the law is interpreted as a licence to act (and therefore enforce a blockade during a non-international conflict) or if the Martens clause limits the general freedom of state action when international law is silent. On the latter interpretation see G.I.A.D. Draper, *The Relationship between the Human Rights Regime and the Law of Armed Conflict*, 1 ISR. Y.B. HUM. RTS. 191, 197-98 (1971); Denise Plattner, *The 1980 Convention on Conventional Weapons and the Applicability of Rules Governing Means of Combat in a Non-International Armed Conflict*, 30 INT’L REV. RED CROSS 551, 552 (1990); OFFICE OF THE JUDGE ADVOCATE GEN., *supra* note 105, ¶ 106.2.

108. Sanger, *supra* note 104, at 421; see also Powers, *supra* note 103, at 61 (“[W]ithin territorial waters each party has a right to prevent supplies from reaching their opponent but that neither can seize, condemn or destroy foreign ships.”); von Heinegg, *supra* note 59, at 218 (noting the exception of international straits and archipelagic waters).

109. TURKEL COMM’N, *supra* note 38, at 49.

110. Sanger, *supra* note 104, at 434. But this lack could also be explained by the status of Hamas as a terrorist organization for a number of countries and, therefore, trade or other relations with Gaza were limited, if they existed at all, as well as the fact that the embargo does not really affect free navigation. See also Von Heinegg, *supra* note 59, at 226 (explaining the lack of protests on the fact that “[e]ither the flag States implicitly recognized Israel’s security interests or they simply did not want to admit that ships flying their flags had been engaged in the smuggling of arms and ammunition.”). See U.N. SCOR, 65th Sess., 6325th mtg. at 9, 11-12, U.N. Doc. S/PV.6325 (May 31, 2010) (the reactions from Russia, Bosnia-Herzegovina and Lebanon, suggest that enforcement of the blockade on the high seas is not viewed favourably).

111. Sanger, *supra* note 104, at 442; see also von Heinegg, *supra* note 59, at 226-27.

112. See Radin, *supra* note 14, at 146; TURKISH NATIONAL COMM’N OF INQUIRY, REPORT ON THE ISRAELI ATTACK ON THE HUMANITARIAN AID CONVOY TO GAZA ON 31 MAY 2010, 61 (2011); see also Buchan, *supra* note 62, at 218 (claiming that “there are no examples of state practice.”).

Affairs, that “[t]he determination made by the Security Cabinet that Gaza is a hostile territory is a factual (rather than legal) description of the region controlled by Hamas”¹¹³ does not really point to an instance of belligerency recognition. Certainly this conflict¹¹⁴ is neither internal¹¹⁵ nor a civil war,¹¹⁶ as two different nations collide. Furthermore, the realization of all the objective criteria is not evident (mainly regarding observance of the laws of war).¹¹⁷ However, there is inconclusive evidence of the subjective criterion of recognition. In the end, this situation could call for an application of belligerency criteria and recognition by analogy¹¹⁸ with all the repercussions that come after. Recognition of belligerency could give a better claim to Israel to exercise several of its actions against the Hamas regime, particularly the stop and search of neutral vessels on high seas. But recognition might also be disadvantageous to Israeli policies; for instance, it would also imply a prisoner-of-war status for captured enemy fighters.¹¹⁹

In recent years, it has become rather typical for armed non-state actors to sign agreements with, *inter alia*, the states they are fighting. Such agreements have occasionally been considered as recognition of belligerency for, in a way, they acknowledge, from the part of states, a corresponding capacity to ANSAs as a subject of international law. Certainly, recognition of belligerency with the signature of a peace agreement lacks almost every practical necessity, especially if the outcome of the agreement is the dissolution of the armed non-state actor and its inclusion in the political and state system. But the situation could be different, if the peace agreement, although it breaks down at some point, comes around as a valid document with the effective end of the armed conflict.

The Arusha Accords is one relevant example.¹²⁰ The reason why this agreement is picked up, among many others, is that art. 1 stipulates that “[t]he war

113. Israeli Ministry of Foreign Affairs, *Behind the Headlines: Israel Designates Gaza a “Hostile Territory”* (Sep. 24, 2007), available at <http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages>; see also James Carey, *Mere Words: The “Enemy Entity” Designation of the Gaza Strip*, 32 HASTINGS INT’L & COMP. L. REV. 643, 645 (2009) (stating that “Israel likely aims to (1) narrow the spectrum of humanitarian law applicable to its actions in Gaza” This suggests also that recognition was not intended).

114. See Konstantinos Mastorodimos, *The Character of the Conflict in Gaza: Another Argument Towards Abolishing the Distinction Between International and Non-International Armed Conflicts*, 12 INT’L COMMUN. L. REV. 437, 438-59 (2010) (treating the various possibilities on how to qualify the conflict).

115. See Buchan, *supra* note 62, at 231.

116. See 1949 Records, *supra* note 20, at 11 (Norway) (“Civil war was a form of conflict resembling international war, but taking place inside the territory of a State.”); James W. Garner, *Questions of International Law in the Spanish Civil War*, 31 AM. J. INT’L L. 66, 66 (1937). But see Radin, *supra* note 14, at 143 (claiming that civil war and belligerency imply a threshold of hostilities rather than a limited geographical scope within a state).

117. Buchan, *supra* note 62, at 231.

118. See *id.*

119. The international armed conflict option would also have similar repercussions but not, necessarily, identical, because the enemy to the state entity is still not a state, while in belligerency recognition the analogy to the state is more serious and brings about more consequences.

120. Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, Aug. 4, 1993, available at <http://www.refworld.org/docid/3ae6b4fcc.html>.

between the Government of the Republic of Rwanda and the Rwandese Patriotic Front is hereby brought to an end.”¹²¹ The use of the word “war” could indicate that the state has qualified the conflict as international. In reality, nobody, including the International Criminal Tribunal for Rwanda,¹²² considered the conflict to be anything other than non-international. Similarly, in other armed conflicts with an ANSA’s participation and in which agreements were signed, these were not considered to be evidence of belligerency recognition, even though, sometimes, their language was reminiscent of the law of international armed conflict,¹²³ the most serious consequence of belligerency recognition.

If anything comes out of the above inquiry, it is that recognition of belligerency still exists in customary international law, to the extent that significant authorities certify it, albeit verbally. State practice, on the other hand, tends to ignore it, with the possible exception of states that are either in the American continent or are deeply influenced by U.S. legal tradition. It is significant that no state is willing and ready to recognize belligerency for itself.

V. EXPLAINING THE RETREAT OF THIS DOCTRINE

The decay of the doctrine can be explained by a variety of reasons. The first, and possibly the most significant, reason relates to the infrequent occurrence of the objective features¹²⁴ as well as the fact that granting international personality to belligerent communities has always constituted an anathema for states.¹²⁵

On a second level, the differences between the prevailing world order when belligerency doctrine reigned, before the Second World War, and today can also offer an explanation. Then, third states would recognize belligerency in order to accommodate their own interests (mainly with regard to maritime commerce), with the outcome of gaining the status of a neutral power. This was an alternative to the inexistence or weakness of international organizations. States were alone in trying to serve their interests. Today, power is much more centralized, even if at times, individual state interests might be masked behind the concerns of the international community. In contrast with the past, when the source of power in the international

121. *Id.*

122. See S.C. Res. 955, ¶ 5, U.N. Doc. S/RES/955 (Nov. 8, 1994).

123. See Agreement on Implementing the Cease-Fire and on Modalities of Disarmament, U.S. INSTITUTE OF PEACE ¶ IV (Jan. 15, 1993), available at http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/somalia_01081993_sup.pdf; Agreement on a Temporary Cease-Fire and the Cessation of Other Hostile Acts on the Tajik-Afghan Border and Within the Country for the Duration of the Talks, art. 4(b) (Sep. 17, 1994), available at <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/taj12.pdf>; Agreement on Ceasefire in Sierra Leone, ¶ 5, (May 18, 1999), available at <http://www.sierra-leone.org/ceasefire051899.html>; The Humanitarian Cease Fire Agreement on the Conflict in Darfur, art. 5 (Apr. 8, 2004), available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/10/Humanitarian-Ceasefire-Agreement-on-the-Conflict-in-Darfur-2004.pdf>.

124. LAUTERPACHT, *supra* note 8, at 182-83. Such reasoning was valid in 1947 and remains valid until today.

125. See TURKEL COMM’N, *supra* note 38, at 49 (with regard to recognition of belligerency for Hamas “the application of such a doctrine implies a level of legitimacy that should not be applied to a recognized terrorist entity.”).

system lied exclusively within states, international organizations now exist and have the capacity to dictate state conduct. Similarly, the interests of states prevailed before World War II, but individual and community interests have since gained a significant place in how states behave - or ought to behave.

Furthermore, international war back then was not explicitly unlawful, while now even internal conflicts, which are not prohibited as such by international law,¹²⁶ might generate international community responses. The linkage of belligerency with the state of war, a rather formalistic - and outdated - way of commencing an armed conflict, might also be a factor for its growing unimportance.¹²⁷

Neutrality is also a principle which is partially on retreat, despite its "fundamental character."¹²⁸ Today, under collective self-defense pacts and other bilateral treaties,¹²⁹ states have a duty to aid the government under attack from a third state. If the contribution of that third state to a rebel army constitutes an unlawful armed attack,¹³⁰ recognition of belligerency, which entails strict neutrality and non-intervention, would cause a possible violation of relevant agreements.¹³¹ More importantly, the evolution of the rules on the use of force brings about a differentiation between the aggressor and the victim, contrary to the impartiality of the neutrality principle.¹³² The fact that ideologies in the Cold War favored intervention¹³³ could also entail that the idea of neutrality seemed less and less relevant, along with belligerency recognition.¹³⁴ Neutrality was similarly modified by collective measures, such as sanctions undertaken by global and regional organizations.¹³⁵ The prohibition on the flow of war goods to sanctioned ANSAs

126. LAUTERPACHT, *supra* note 8, at 175; Higgins, *supra* note 7, at 87; PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 318 (7th ed. 1997).

127. CULLEN, *supra* note 5, at 21.

128. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 261 (Jul. 8).

129. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 258-63 (4th ed. 2004); DEP'T OF THE NAVY, *THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*, NWP 1-14 M, ¶ 7.2.2 (2007) [hereinafter DEP'T OF THE NAVY].

130. BOTHE, *supra* note 51, at 579.

131. But see CRAWFORD, *supra* note 6, at 382 ("[N]eutrality between belligerents could be set aside if there existed, for example, a treaty of alliance or other commitment with the metropolitan State.").

132. SAN REMO MANUAL, *supra* note 38, at § III.7; BOTHE, *supra* note 51, at 573.

133. See Falk, *supra* note 13, at 189, 207.

134. See Franck & Rodley, *supra* note 67, at 680 ("[T]his classification system also suffers from something much more serious-it no longer responds either to the needs of good order or to the emerging practice of the international community."). But see Doswald-Beck, *supra* note 70, at 197 ("[A] more likely explanation is the replacement of the doctrine of belligerency in modern international law by the doctrine of non-intervention in the internal affairs of States . . .").

135. See SAN REMO MANUAL, *supra* note 38, at § III.8; von Heinegg, *supra* note 103, at 218; DEP'T OF THE NAVY, *supra* note 129, ¶ 7.2.1; Georgios C. Petrochilos, *The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality*, 31 VAND. J. TRANSNAT'L L. 575, 580 (1998); BOTHE, *supra* note 51, at 573 ("The law of neutrality is modified by the Charter of the United Nations or by a binding decision of the Security Council.").

or states is an example of such measures, contrary to the “right of private persons to trade with belligerents.”¹³⁶

Finally, even if belligerency was an institution whose rationale was not based on humanistic considerations, its effect was profoundly such, to the extent that no regulation existed for civil wars. The conclusion of the rules for non-international armed conflicts and their growing scope has lessened the importance of regulation through belligerency recognition by the incumbent government.¹³⁷ Otherwise the efforts of the civil society and possibly even by states with a humanitarian interest might have lead to a different practice.

Despite these reasons, there have been several attempts to revitalize the doctrine, mainly by scholars. This represents a preliminary inquiry on whether belligerency recognition deserves any future.

VI. PAST ATTEMPTS OF REVITALIZATION

During the negotiations for the Geneva Conventions, belligerency recognition was specifically discussed at the beginning, when there was an attempt to make several of the Geneva Conventions applicable to internal conflicts. Greece, for example, proposed that “a majority of members of the Security Council of the United Nations should be competent for the purpose . . .” of belligerency recognition.¹³⁸ This was also proposed by eminent jurists, such as Jessup,¹³⁹ although he cited problems of procedure. Such a possibility would have the advantage of collectivization of recognition and therefore it could not be considered by the parent state as “a gratuitous manifestation of support for the cause of insurgents.”¹⁴⁰ In the end, of course, there was no real change to procedures and the customary law of belligerency recognition stayed still.

The appearance of national liberation conflicts was also suggestively linked with the doctrine.¹⁴¹ Judge Ammoun, in a Separate Opinion, went one step further, when he contended that “[t]he recognition by the United Nations of the legitimacy of the Namibian people's struggle against the South African aggression is nothing less than a recognition of belligerency.”¹⁴² However, he combined such recognition with a distinction between the aggressor and its victim as well as the United Nations sanctions against South Africa and, therefore, there was no room for

136. VON GLAHN, *supra* note 5, at 749; see Bothe, *supra* note 51, at 585 (about how this freedom was modified).

137. Sanger, *supra* note 104, at 425; Radin, *supra* note 14, at 131 (describing it as a “major factor”).

138. 1949 RECORDS, *supra* note 20, at 11.

139. JESSUP, *supra* note 39, at 54; LAUTERPACHT, *supra* note 8, at 253-55; Radin, *supra* note 14, at 145.

140. LAUTERPACHT, *supra* note 8, at 254.

141. See Secretary General, *Respect for Human Rights in Armed Conflicts*, ¶ 209, U.N. Doc. A/8052 (Sep. 18, 1970).

142. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 56, 92 (Jun. 21). See also John Dugard, *SWAPO: The Jus ad Bellum and the Jus in Bello*, 93 S. AFR. L. J. 144, 156 (1976) (suggesting that recognition of SWAPO by the General Assembly “might arguably be seen as recognition of SWAPO’s status as a belligerent in international conflict”).

neutrality toward both belligerents. In addition, neutrality cannot be reconciled with the attempts of states individually and through the General Assembly to create a norm which would allow material support to national liberation movements,¹⁴³ unless it was considered to be a further exception to the relevant effect of recognition by third states. In any case, the classification of national liberation wars as international conflicts through Additional Protocol I¹⁴⁴ in 1977, did not leave much room for a link with belligerency recognition.¹⁴⁵

The intervention of third states in an internal armed conflict was also suggestively linked with recognition of belligerency. In the words of Aldrich:

[W]henever a state chooses to send its armed forces into combat in a previously non international armed conflict in another state – whether at the invitation of that state's government or of the rebel party – the conflict must then be considered an international armed conflict, and the rebel party must be considered to have been given, from the date of such intervention, belligerent status, which, as a matter of customary international law, brings into force all of the laws government international armed conflicts.¹⁴⁶

The prospect of such effects for intervention was also proposed with regard to the conflict in Vietnam,¹⁴⁷ a rather typical form of internationalized armed conflict, meaning an essentially internal armed conflict with the intervention of (at least) a state actor in the side of one of the warring parties (usually the parent state). Intervention (usually by invitation) could be considered as an implicit recognition of belligerency by the parent state who acknowledges that the internal conflict cannot be solved solely by use of its own military means. However, the internationalization of an internal conflict has fewer effects than recognition of belligerency. Furthermore, for the majority of the doctrine, intervention on the side of the government does not internationalize an armed conflict.¹⁴⁸

143. See G.A. Res. 2105 (XX), U.N. Doc. A/RES/2105 (Dec. 20, 1965); G.A. Res. 2189 (XXI), U.N. Doc. A/RES/2189 (Dec. 13, 1966); G.A. Res. 2649 (XXV), U.N. Doc. A/RES/2649 (Nov. 30, 1970). Similarly, see Helmut Freudenschuss, *Legal and Political Aspects of the Recognition of National Liberation Movements*, 11 MILLENIUM J. INT'L STUD. no. 2, 115, 116 (1982) ("Recognition... was not desirable in view of the obligation to neutrality and not possible because of the very nature of these struggles.").

144. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3.

145. See Sanger, *supra* note 104, at 442 ("Article 1(4) was a replacement of belligerency recognition").

146. Aldrich, *supra* note 81, at 63 (his argument mainly resting on the impracticability of applying simultaneously the rules on international and non-international armed conflicts).

147. See Siotis, *supra* note 58, at 287.

148. See MOIR *supra* note 7, at 51; see also INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 2 (2006), available at <http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf>; Momtaz, *supra* note 82, at 48.

To sum up, none of the attempts to revitalize the doctrine of belligerency recognition has had any real effect in practice or doctrine. Therefore, it is to be questioned whether there is any justification to pursue this matter any further.

VII. REASONS TO PURSUE THE REVITALIZATION OF BELLIGERENCY RECOGNITION

There are several positive aspects to the revitalization of the doctrine. Firstly, recognition transforms the recognized belligerent into a person that incurs certain responsibilities, including the obligations of the laws of international armed conflict. Although the differences in the regulation between internal and international conflict are much less significant than they were twenty years ago, more substantive rules are needed for the possible addressees of belligerency recognition, ANSAs with significant powers and a measure of territorial control. Territorial control implies that a certain segment of the population is “governed” by the belligerent and the law of non-international armed conflict covers more basic questions. It is no coincidence that the debate on human rights law applicability to armed non-state actors centers mostly, but not exclusively, on actors with the abovementioned qualities.¹⁴⁹ Recognition of belligerency would bring an enhanced protection for civilians and non-combatants through humanitarian law,¹⁵⁰ not so much because of the input of new rules, but due to the more detailed regime. The international personality of the recognized belligerent would also infuse its obligations with customary human rights law.

A second added value relates to the applicability of legal rules when, technically, there are no clashes. Under the law of non-international armed conflict, a standstill in violence or a ceasefire could lead to the inapplicability of

149. See Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, the Special Representative of the Secretary-General for Children and Armed Conflict, the Special Rapporteur on Violence against Women, its Causes and Consequences, the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, the Special Rapporteur on the Right to Food, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur on the Right to Education and the Independent Expert on the Question of Human Rights and Extreme Poverty, *Human Rights Situation in Palestine and other Occupied Arab Territories*, H.R. Council, 10th Sess., May 29, 2009, ¶ 22, U.N. Doc. A/HRC/10/22; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 5, U.N. Doc. A/HRC/8/3 (May 2, 2008) (by Philip Alston); United Nations Fact Finding Mission on the Gaza Conflict, *Human Rights Situation in Palestine and other Occupied Arab Territories*, ¶ 305, U.N. Doc. A/HRC/12/48 (Sep. 25, 2009); see also Nigel S. Rodley, *Can Armed Opposition Groups Violate Human Rights?*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* 297, 298 (Kathleen E. Mahoney & Paul Mahoney eds. 1993) (including armed opposition groups exercising effective power over a significant segment of population and conducting sustained, organized armed hostilities, while excluding ANSAs below this level); LIESBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 52 (2002); Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, *International Law and Armed Non-State Actors in Afghanistan*, 93 INT’L REV. RED CROSS 47, 70 (2011) (seemingly also adopting this approach).

150. See also Radin, *supra* note 14, at 119.

humanitarian law.¹⁵¹ Under the laws of war, the relevant rules will at least apply for the whole period that certain territory is placed under the authority of the armed non-state actor and upon the general close of military hostilities or for the whole period that belligerency exists. The continuing application of humanitarian law in such situations is certainly desirable, especially since the applicability of human rights law to armed non-state actors is still not firmly established; and even if it was considered so, the scope of obligations is still uncertain.

Probably the most important outcome of recognition is the international responsibility of the recognized belligerent. The relevant responsibility of the ANSA, even in situations of humanitarian law, where it is evident that they have primary obligations, is under-developed.¹⁵² Recognition of belligerency could give states the opportunity to make claims against the belligerent, exercise diplomatic protection, take countermeasures and so on. The international responsibility of the armed non-state actor would also carry certain advantages for the parent state, to the extent that outside pressure for reparations would ease.

Finally, another positive consequence could relate to the legal validity of agreements between the recognized belligerent and the recognizing state. As the law stands today, such agreements before recognition are denied any international legal validity,¹⁵³ and thus, their status, interpretation and means of enforcement are uncertain. International legal status would place such agreements under a certain regime, similar to the one that exists through the Vienna Convention on the Law of Treaties,¹⁵⁴ with all the strengths and weaknesses that it carries.

These positive consequences, though, are not free of some prospective problems or objections.

VIII. POSSIBLE OBJECTIONS AND RELATED PROBLEMS

The revival of the doctrine of belligerency would not be unproblematic. To start, several notions in the law of international armed conflict could not be applicable (e.g., the “protected” person and the distinction between “own” and “occupied” territory). However, “those difficulties already arise in internationalized

151. See *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 627 (Sept. 2, 1998); Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT'L REV. RED CROSS 491, 507 (2006).

152. ZEGVELD, *supra* note 149, at 229.

153. See *Prosecutor v. Kallon et. al*, Case No. SCSL 04-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 48 (Mar. 13, 2004); see also, more generally, CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA (2008); Pieter H. Kooijmans, *The Security Council and Non-State Entities as Parties to Conflicts*, in INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 333, 333-46 (Karel Wellens ed., 1998); Emmanuel Roucouas, *Non-State Actors: Areas of International Responsibility in Need of Further Exploration*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 391, 391-404 (Maurizio Ragazzi ed., 2005).

154. Vienna Convention on the Law of Treaties, May 23, 1969, 1115 U.N.T.S. 331.

non-international armed conflicts,¹⁵⁵ while it is not uncommon for ANSAs and the population of the controlled territory to share the same aspirations. Certain solutions have been proposed. The Tadic judgement has referred to allegiance,¹⁵⁶ while loyalty¹⁵⁷ could also be relevant. Even in the law of neutrality, citizens of a neutral state can enter in the service of a belligerent army and, then, be considered as nationals of the respective party;¹⁵⁸ this analogy can be drawn for ANSAs as well. With regard to the distinction between “own” and “occupied” territory, there are two possible answers: the first is to treat the whole territory under the control of insurgents as occupied territory.¹⁵⁹ Simultaneously, the state would never be subjected under the same legal regime, only the one that applies for its own territory. The second is to consider the territory of the recognized belligerent as its “own,” at the moment of recognition. Consequently, the territory acquired by the parent state after recognition would be considered and treated as occupied for the purposes of this specific conflict.

On a second level, states would be unwilling to grant recognition as this leads to an upgrade of non-state actors. However, there is already a slow shift in this regard because there are at least two crimes listed in the Rome Statute¹⁶⁰ for which the necessities of the party to the non-international armed conflict are taken into account.¹⁶¹ Furthermore, the recognized belligerent “does not have all the rights of a state . . . no rights, no immunities, no claims beyond those immediately connected with the war.”¹⁶² Therefore, it appears that their “upgrade” is not extensive. Even the outcome that individual members of the armed non-state actor cannot be punished for treason,¹⁶³ a major *policy* impediment for the application of belligerency recognition by the parent state, may not be as important as it used to be in the past. There have been many instances where the state has treated insurgents as prisoners of war (Algeria, Congo and Nigeria in the 1950s-1960s). Moreover, there is a significant tendency to grant amnesties in non-international armed conflicts, although it is certainly not a legal obligation.¹⁶⁴ It is possible that the recognizing state could withhold recognition for certain matters, although this has not been considered in the past.

155. James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313, 345 (2003).

156. Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, Judgement, ¶ 163-69 (Jul. 15, 1999).

157. See Wright, *supra* note 21, at 56.

158. BOTHE, *supra* note 51, at 586.

159. See CASTREN, *supra* note 18, at 155.

160. Rome Statute of the International Criminal Court, art. 8.2(e)(viii), (xii), Jul. 17, 1998, 2187 U.N.T.S. 3. The pedigree of art. 8.2(e)(viii) is art. 17 of the Additional Protocol II.

161. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol I), Dec. 7, 1978, 1125 U.N.T.S. 4.

162. WILSON, *supra* note 17, at 27.

163. But see Powers, *supra* note 103, at 57 (“even if a state of insurrection or belligerency is recognized, the parent state, after suppressing the revolt, is entitled to subject the rebels to its laws”).

164. See Mastorodimos, *supra* note 114, at 467.

A third possible objection relates to the complementary human rights regime.¹⁶⁵ Human rights certainly do offer a more comprehensive framework of conduct; therefore, it could be argued that the focus should be on how to bind armed groups. However, they might prove unworkable in times of armed conflict, at least because sufficient tailoring has not yet taken place. Furthermore, human rights must be deemed applicable whenever belligerency is recognized, especially customary human rights law, because of the limited international personality of recognized belligerents. To the extent that the applicability of human rights law in times of armed conflict is accepted,¹⁶⁶ it would be absurd to apply a different standard in a belligerency situation. Even extra-territoriality would pose much less of a problem,¹⁶⁷ because 1) the territory is not detached and 2) customary human

165. See Aristidis Calogeropoulos-Stratis, *Droit Humanitaire - Droits de l'Homme et Victimes des Conflits Armés*, in ETUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE EN L'HONNEUR DE JEAN PICTET 654, 661 (Christophe Swinarski ed., 1984); see also Dale Stephens, *Human Rights and Armed Conflict - the Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 YALE HUM. RTS. & DEV. L. J. 1, 23 (2001); General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Hum. Rts. Comm., 80th Sess., ¶11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) ("While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."); see also Security Council, Report of the International Commission of Inquiry on Darfur to the Secretary-General, ¶143, U.N. Doc. S/2005/60 (Feb. 1, 2005).

166. See G.A. Res. 45/170, U.N. Doc. A/RES/45/170 (Dec. 18, 1990); G.A. Res. 46/136, U.N. Doc. A/RES/46/136 (Dec. 17, 1991); G.A. Res. 48/153, U.N. Doc. A/RES/48/153 (Dec. 20, 1993); G.A. Res. 52/145, U.N. Doc. A/RES/52/145 (Dec. 12, 1997); S.C. Res. 1019, U.N. Doc. S/RES/1019 (Nov. 9, 1995); S.C. Res. 1034, U.N. Doc. S/RES/1034 (Dec. 21, 1995); S.C. Res. 1227, U.N. Doc. S/RES/1227 (Feb. 10, 1999); S.C. Res. 1265, U.N. Doc. S/RES/1265 (Sep. 17, 1999); see also Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 240 (Jul. 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (Jul. 9). Finally, as regards individual publicists, see Sean MacBride, *Human Rights in Armed Conflicts: The Inter-Relationship between the Humanitarian Laws and the Law of Human Rights*, 9 MIL. L. & L. WAR REV. 373, 373-91 (1970); Gerhard Von Glahn, *The Protection of Human Rights in Time of Armed Conflicts*, 1 ISR. Y.B. HUM. RTS. 208, 214 (1971); Morris Greenspan, *The Protection of Human Rights in Time of Warfare*, 1 ISR. Y.B. HUM. RTS. 228, 228 (1971); Calogeropoulos-Stratis, *supra* note 164, at 656; John Quigley, *The Relation Between Human Rights Law and the Law of Belligerent Occupation: Does an Occupied Population Have a Right to Freedom of Assembly and Expression?*, 12 B.C. INT'L & COMP. L. REV. 1, 25 (1989); Adam Roberts, *Prolonged Military Occupation: the Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 72 (1990); Robin S. Myren, *Applying International Laws of War to Non-International Armed Conflicts: Past Attempts, Future Strategies*, 37 NETH. INT'L L. REV. 347, 349 (1990); Abi-Saab, *supra* note 81, at 222; Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 ISR. L. REV. 24, 30 (1992); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 267(2000); MOIR, *supra* note 7, at 193; John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 VAND. J. TRANSNAT'L L. 1447, 1507 (2006); Bill Bowring, *Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights*, 14 J. CONFLICT & SECURITY L. 485, 487 (2009).

167. For a brief exposition and discussion on extra-territoriality problems of human rights, see Konstantinos Matorodimos, *The Utility and Limits of Human Rights Law and International Humanitarian Law's Parallel Applicability*, 5 REV. INT'L L. & POL. 129, 135-36 (2009).

rights law applies regardless.¹⁶⁸ In essence, recognition of belligerency brings about the applicability of human rights law.

Additionally, it might be problematic for third states to recognize the belligerency of an armed non-state actor and to maintain neutrality when sanctions have been instituted by the UN or another regional organization. In similar cases, either third states should avoid recognition or they should keep neutral only to the extent that sanctions allow them to remain so.

To summarize, the revitalization of belligerency recognition could cause some difficulties and it might be met with suspicion. However, none of these difficulties are insurmountable. In fact, the unwanted consequences of belligerency recognition for states have occasionally been a reality in today's conflicts.

IX. CONCLUSION

Although the doctrine of belligerency recognition has been declared useless and obsolete, it is still discussed on occasion. The Gaza conflict fuelled this discussion up to a point. Despite being in misuse for many years, it appears that belligerency recognition is still considered as being in existence. It has been argued that, in appropriate cases, especially when the armed non-state actor seriously challenges the primacy of the parent state, belligerency recognition can be useful and offer advantages that are not attainable through other applicable rules of international law. Although these advantages also carry some drawbacks, these are not insurmountable. It is difficult to predict whether there will be any future in belligerency recognition, either as it stands or as it can be modified.¹⁶⁹ Nonetheless, it deserves a place in international law doctrine and practice.

168. U.S. ARMY, *supra* note 41, at 281; *see also* Cerone, *supra* note 166, at 1493; Anthony Cassimatis, *International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law*, 56 INT'L & COMP. L.Q. 623, 635 (2007); DINSTEIN, *supra* note 41, at 71.

169. *See* Radin, *supra* note 14, at 142-48.